

NO. 49403-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ORLENA DRATH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable Toni Sheldon, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Ineffective assistance of counsel deprived appellant of the opportunity to fully consider the State's plea offer.

2. There is a reasonable probability that but for the misinformation by counsel about sentencing consequences appellant would have accepted the State's plea offer.

3. The trial court violated appellant's constitutional rights to confrontation and to present a defense by excluding evidence of a key prosecution witness's bias.

4. Defense counsel's failure to object to and seek a curative instruction for prosecutorial misconduct in closing argument denied appellant effective representation.

Issues pertaining to assignments of error

1. Prior to trial, defense counsel misinformed appellant as to the sentencing consequences she faced if convicted. In light of this misinformation appellant rejected a plea offer and proceeded to trial. She was convicted and sentenced more severely than counsel represented was possible and far in excess of the State's plea offer. Where there is a reasonable probability counsel's erroneous advice affected the outcome of the proceedings, did appellant receive ineffective assistance of counsel?

2. Appellant was charged as an accomplice in multiple counts. Her former boyfriend entered a guilty plea to reduced charges and testified against her at trial. Appellant sought to establish through cross examination about a letter the witness wrote appellant that his attitude toward her changed after she rejected his marriage proposal and he first implicated appellant in the crimes shortly afterwards, but the court excluded the evidence as irrelevant. Did exclusion of evidence of the key prosecution witness's bias violate appellant's rights to confrontation and to present a defense?

3. The prosecutor committed misconduct in closing argument by misrepresenting the State's burden of proof and the jury's role in assessing the evidence. Where this error could have been cured by an instruction from the court, did counsel's failure to object and request a curative instruction deny appellant effective representation?

B. STATEMENT OF THE CASE

1. Procedural History

On April 14, 2011, the Mason County Prosecuting Attorney charged appellant Orlena Drath with unlawful possession of a firearm in the second degree, possession of a stolen firearm, and trafficking in stolen property in the first degree. CP 418-18; RCW 9.41.040(2)(a)(i); RCW

9A.56.310(1); RCW 9A.82.050. The matter was dismissed without prejudice in June 2011 so that federal charges could be pursued, and reinstated in Mason County in May 2013 when the federal prosecution was dropped. CP 412-15. After the information was amended several times, Drath ultimately went to trial on charges of residential burglary, first degree burglary, first degree theft, theft of a firearm, first degree unlawful possession of a firearm, second degree unlawful possession of a firearm, first degree trafficking in stolen property, and bail jumping. CP 330-38; RCW 9A.52.024(1); RCW 9A.52.020; RCW 9A.56.030(1)(a); RCW 9A.56.020(1); RCW 9A.41.040(1)(a); RCW 9A.41.040(2)(a)(i); RCW 9A.82.050; RCW 9A.76.170. The first trial before the Honorable Toni A. Sheldon ended in mistrial. CP 354. Following the second trial, the jury returned guilty verdicts on all counts. CP 252-60.

Drath filed a pro se motion for a new trial alleging ineffective assistance of counsel, among other issues. CP 111-16. The court allowed trial counsel to withdraw and appointed substitute counsel, who filed a motion for new trial. CP 100-03, 108. After an evidentiary hearing, the court denied the motion for new trial. CP 4-10, 49.

The case proceeded to sentencing. The court found that the two unlawful possession of a firearm offenses merged and imposed sentence only on the first degree conviction. CP 18, 21; RP 1615. The court

imposed standard range sentences, with the sentences for theft of a firearm and unlawful possession of a firearm in the first degree running consecutively pursuant to RCW 9.94A.589(1)(c), for a total confinement of 128 months. CP 21. It found that Drath had the likely future ability to pay legal financial obligations and imposed both mandatory and discretionary LFOs. CP 23; RP 1617-18.

Drath filed this timely appeal. CP 14-15.

2. Substantive Facts

Fernando Maffei and Susan Karlmann owned a house in the Lake Limerick area of Mason County. RP 185. They lived there until 2008, and then they moved but kept the house as second home. RP 229-30. Maffei used it primarily to house his various collections, including knives, guns, coins, toy cars, and memorabilia. RP 210-13, 230. Maffei and Karlmann usually visited the property every two weeks or so. RP 861. On April 2, 2011, they returned to the house after having been gone longer than usual and discovered the house had been ransacked. RP 189-90, 231-32, 861. Two gun safes had been opened and about 75 guns removed. RP 233, 249. Numerous items from Maffei's collections were also missing. RP 326. They called the police. RP 187.

Detective Jeffrey Rhoades responded to the scene. RP 859. He took photographs to document the condition of the property, and he tried

to collect fingerprints but was unable to find any usable prints. RP 358-59. Rhoades looked for anything that might have been brought to the scene by the burglars, but he located nothing that led to an identification. RP 361.

Rhodes saw a trail leading from the back yard through the woods toward Mason Lake Road, which Maffei said had not been there the last time he was at the house. RP 336, 363. Rhoades followed the trail and found a box containing items belonging to Maffei. RP 364-65. When he followed the trail again two days later he found another box and a long gun leaned up against a tree. RP 384. Maffei identified both the contents of the box and the gun as his. RP 384-85. Rhoades concluded that the people responsible for the burglary had used the trail when removing items from the house. RP 365.

When he received a list of the missing guns from Maffei, Rhoades provided that information to the owner of a local gun shop. RP 391. The owner informed Rhoades that a customer, John Castle, had looked at a collection of guns being offered for sale. Rhoades met with Castle who reported that the guns on the list were the guns he had seen. RP 393-94. He said he had gone to look at the guns with a friend, Jim Oakes, who ended up buying them. Scott Johnson was also with them. RP 395.

On April 6, Rhoades spoke to Oakes, who confirmed that he had bought a collection of long guns and one handgun. RP 366. Rhoades went to Oakes's house and established that the guns he had purchased were the ones Maffei reported stolen, and the guns were taken into evidence. RP 397-98, 401.

Oakes told Rhoades that the purchase had taken place at the home of George Cavanaugh. RP 404. Oakes had gone to Cavanaugh's house on April 4 to look at the guns by himself and returned the next day with Castle and Johnson. He took serial numbers from three of the guns at that point, and after determining that those guns had not been reported stolen, he returned to Cavanaugh's house and picked up the guns. RP 412.

Cavanaugh showed up while Rhoades was talking to Oakes, and he gave a statement as well. RP 405. Cavanaugh denied any involvement in the sale at that time. RP 405. Oakes and Cavanaugh said the man selling the guns was named Scott, and there was a woman involved too, who Cavanaugh referred to as Lena. RP 406, 412.

Rhoades had had prior dealings with Scott Herigstad and knew he lived near Maffei's house. When Oakes and Cavanaugh mentioned a man named Scott, Rhoades thought of Herigstad. He made a montage using Herigstad's driver's license photo and showed it to Oakes, who identified Herigstad. RP 408-09.

Oakes testified that when he first went to Cavanaugh's house, Herigstad was there, and he showed Oakes a collection of rifles. Herigstad said he wanted to sell the collection as a whole, and he and Oakes haggled over the price. RP 427-28. Herigstad then left and returned a short time later with Orlena Drath and a box of pistols. RP 428. Although Oakes had known Cavanaugh and Herigstad for some time, he had not met Drath before. RP 424-26, 428. After some negotiations, Oakes agreed to purchase all the rifles and one of the pistols. RP 430. Oakes testified that he bought the pistol the first day, handing the money to Drath. RP 432. He brought his friends to look at the rifles the next day before making a final decision. RP 433-34. The day after that Oakes picked up the rifles and gave Cavanaugh a down payment, which he told Cavanaugh to hold until he confirmed that the rest of the serial numbers came back clean. RP 437-38.

In his initial statement to Rhoades, Oakes did not mention that a woman was involved in the transaction. RP 440. Nor did he mention that he had bought a handgun or that he had given the money for the handgun to Drath. RP 444. It was not until he gave a later statement that he mentioned Drath being present. RP 440, 450.

Rhoades testified that the trail he had discovered in Maffei's backyard led to a guardrail along Mason Lake Road at the edge of the

property where Herigstad and Drath lived. RP 364, 378. On April 11, Drath was driving Herigstad's truck when she was pulled over and placed under arrest. RP 826-27. Rhoades spoke to her briefly, and she denied being involved in the burglary. RP 515-16. After speaking with Drath, Rhoades executed search warrants at the residence Herigstad shared with Drath and at the neighboring residence of Herigstad's family, where he found property stolen from Maffei's house. RP 515, 517-27.

Rhoades then returned to the precinct and interviewed Drath. RP 515. Drath agreed that she had been present at Cavanaugh's house the two days Oakes was there, saying he did not buy anything the first day and he came back with two friends the next. RP 530-31. She admitted touching a pistol, saying someone had handed it to her and she placed it back in a box. RP 907.

During this interview Drath told Rhoades she had received a voice mail from Cavanaugh on April 6 telling her and Herigstad he had been taken into custody and they should run. RP 531. Rhoades listened to the voicemail and made a recording of it. RP 532-33.

Drath provided further evidence regarding the stolen property after her arrest. Drath rented a storage unit in May 2011. RP 846, 1037. She testified that after her arrest she moved in with her mother and needed to store her belongings. RP 1037. A friend staying at the trailer she had

shared with Herigstad packed up everything. RP 1038. When Drath came across anything she did not recognize as she moved the boxes into storage, she gave it to Rhoades. RP 1098. On more than one occasion Drath turned over items she had found with her belongings. RP 832, 835. Rhoades searched Drath's storage unit in September, and a few more items of property belonging to Maffei were found. RP 537-38, 846.

Drath also contacted Rhoades in June, through her attorney, and arranged to take him to a location off the railroad tracks where she thought Herigstad might have hidden some items. RP 841. Rhoades recovered property belonging to Maffei from that location as well. RP 841-42.

Scott Herigstad testified that in March and April 2011 he lived in a mobile home in the Lake Limerick area with Drath. He was separated from his wife, who lived in a house on the adjacent property. RP 543. According to Herigstad, he and Drath walked past Maffei's house one night and wondered whether anyone lived there, since there was usually no one around. RP 543-44. They ended up going into the house to see what was there, returning multiple times, and stealing property. RP 545. They would walk to and from the house through the backyard and along Mason Lake Road. RP 549. Herigstad put the items he stole in and under the trailer where he was living. RP 551. Herigstad used a torch to open a

gun safe in the bedroom of Maffei's house, and he took the guns found inside to his trailer. RP 551-52, 554.

Herigstad testified that when he and Drath tried to sell some swords removed from the house to Cavanaugh, they told him about a second gun safe at the house. Cavanaugh wanted to see the safe, and they took him to the house to look at it. RP 556. Cavanaugh believed he could cut the safe open, and he returned to the house with Herigstad a day or two after that. RP 558-59. They found more guns in the safe and left them there, returning for them later. RP 560, 562. They developed a plan to sell the guns to Oakes, a friend of Cavanaugh's. RP 563-64. According to Herigstad, Drath did most of the talking when negotiating the sale to Oakes. RP 565.

Herigstad learned that police were involved when Cavanaugh left a message on Drath's phone saying they needed to leave town. RP 567-68. He testified that he and Drath took some of the stolen property from their trailer and hid it along the railroad tracks. RP 571-72. Then they went on a trip along the Washington coast with his son and Drath's two boys. RP 568.

Herigstad turned himself in on May 3, and he remained in custody at the county jail. RP 573-74. He pled guilty to first degree burglary, theft of a firearm, and trafficking in stolen property arising from these events.

RP 541-42. When he turned himself in, Herigstad told Rhoades that Cavanaugh had done the burglary and stolen the guns and then called him and Drath to his house. RP 639. Herigstad gave his first recorded statement in July 2011, and another in August 2011, after his conviction. RP 591, 846. At that point he admitted his responsibility and also implicated Drath. RP 591.

Cavanaugh was charged with federal offenses related to these events, and he entered a guilty plea to possession of a stolen firearm and making a false official statement. RP 689, 717. In December 2011 he admitted he knew where the remaining guns were located, because he had disposed of them in a swamp. RP 719. He also said in his statement that he had participated with Herigstad and Drath in the theft of multiple firearms from Maffei's house in March 2011. RP 720. Under his plea agreement Cavanaugh was required to cooperate with the prosecution of others in the case, including complete and truthful statements to law enforcement and testimony at any trial. RP 720-21. In exchange the government agreed not to prosecute him for any further offenses supported by the evidence and to recommend a sentence which reflected his cooperation. RP 722. The Mason County prosecutor also agreed not to charge him with any offense related to the burglary. RP 723.

Cavanaugh testified consistent with the statements he made to secure his plea agreement. He testified that Herigstad and Drath had brought some knives and swords to his house, wanting to sell them, and he bought a knife for \$40, handing the money to Drath. RP 726-27. Two or three days later Herigstad asked for his help with a safe. RP 729. He went with Herigstad and Drath to look at the safe, and returned with Herigstad in the next couple of days to open it. RP 731, 734, 736, 738. Cavanaugh said Drath came to the house after he had opened the safe. RP 739. They left with items from the house, and Herigstad later returned for the guns in the safe. RP 741, 749. On April 4 the guns were brought to Cavanaugh's house so Oakes could look at them, and they stayed there until Oakes picked them up two days later. RP 750-51.

Cavanaugh testified that Herigstad and Drath were at his house the first time Oakes came to look at the guns, but Drath remained sitting on the couch because she wanted nothing to do with it. RP 751. According to Cavanaugh, Drath was unhappy with the prices Oakes and the others were discussing, so she took over the negotiations. RP 778. Cavanaugh also testified that Drath sold Oakes a pistol that day. RP 778.

Cavanaugh testified that after learning that Oakes was talking to law enforcement, Herigstad left a box with the stolen pistols in Cavanaugh's back yard. RP 780. Cavanaugh found them the next day,

after he gave his initial statement to Rhoades. Rather than turning the pistols over to law enforcement, he threw them in a pond. RP 781, 783-84.

Cavanaugh admitted that he had lied in his statements to Rhoades in April and May 2011. He said he did not know Herigstad's last name, which was not true. RP 786. He also told Rhoades he had reported everything he knew, but he did not disclose what he had done with the pistols until his December statement. RP 790, 797. Cavanaugh testified he believed Herigstad was going to take responsibility for everything, so he did not reveal his involvement until he realized that did not happen. RP 801-02. The first time Cavanaugh admitted any involvement was in his statements in December 2011. RP 847.

At trial, the State presented testimony from Morgan Tucker and Ian Hastings, who said they were at Cavanaugh's house in late March 2011 when Herigstad and Drath were there trying to sell some swords and knives. RP 130-34, 647-48. Tucker said he saw Drath sell Cavanaugh an elk horn knife. RP 134. Maffei identified the knife as one that was missing from his house. RP 243.

Claude Marsh testified that Drath had approached him about how to open safes. She asked about cutting into a safe with a torch, and he told her it would be better to use a chisel or awl. RP 160, 163. Walter Harvey,

who works at a sporting goods store, testified that he had told Rhoads that two men and a woman came to the store in March or April 2011 asking about safes, although he later said the encounter could have occurred as far back as the previous fall. RP 641-42.

The defense stipulated to Drath's previous convictions for the purposes of the unlawful possession of a firearm charges. RP 116; CP 355, 191. The State also presented evidence to support the bail jumping charge, which the defense did not challenge. RP 118-25. The defense presented evidence and argument that Drath was not involved with the other charged offenses, however.

Drath's daughter testified that on March 30, 2011, the day Cavanaugh identified as the day he broke into the gun safe at Maffei's property, she was with Drath in Olympia getting a sports physical so she could join the track team. RP 794, 948-49. Drath's son testified that he was with them as well. RP 965. They remembered that they left home around 5:00 p.m., the appointment was at 6:00, and it lasted about 45 minutes. RP 951. Documents from the clinic confirmed the appointment date and time. RP 930. After the appointment they went shopping and then picked up dinner to eat on the way home. RP 952-53, 967. They arrived home sometime after 9:00. Cavanaugh's car was in the driveway,

but neither he nor Herigstad was in the house. RP 953-54, 967-69. Drath confirmed this account in her testimony. RP 1019-22.

Drath testified that she and her children lived with Herigstad in the trailer in early 2011. RP 1005. She met Cavanaugh and his wife through Herigstad, who was a longtime family friend of theirs. RP 1008-09. Drath was arrested on April 11, 2011, after returning from a spring break trip she took with her sons and Herigstad and his son. RP 1009-10. They had left on April 6, after Herigstad returned from Cavanaugh's house. They had been planning the trip for a while. RP 1013. As they were leaving, she received a voice mail from Cavanaugh telling her and Herigstad to leave. She was not sure why he left that message, although she had some suspicions. RP 1017-18.

Drath had been told that items from Maffei's house were found on her property. She testified that she did not put those items there and did not know how they got there. RP 1038. The trailer had an open carport for storage, and there were a lot of items in there she did not recognize, because Herigstad used it as well. RP 1035.

Drath testified that she was not in Maffei's house on March 30, 2011, or any other time. RP 1024. She learned from Rhoades that some firearms were taken from the house. She denied taking part in any transactions where guns were being sold, although she was in

Cavanaugh's house when they occurred. RP 1028. Drath testified that she and Herigstad were at Cavanaugh's house when Oakes came over, and that was the first time she saw the guns. She did not recall if she had handled any of the guns, although she acknowledged that there was a pearl-handled gun everyone was looking at. RP 1031-32. Drath said that Cavanaugh and Herigstad were trying to sell the guns, but she was not involved in the conversation and did not negotiate the sale. RP 1032. Drath testified that she was at Cavanaugh's house when Oakes returned with two friends, but she was not there when Oakes bought the guns. RP 1032-33.

C. ARGUMENT

1. INEFFECTIVE ASSISTANCE OF COUNSEL
RESULTED IN LOSS OF THE OPPORTUNITY TO
FULLY CONSIDER THE STATE'S PLEA OFFER.

Two of Drath's convictions were for first degree unlawful possession of a firearm and theft of a firearm. By statute, sentences on these offenses must be served consecutively. RCW 9.94A.589(1)(c)¹.

¹ RCW 9.94A.589(1)(c) provides:

If an offender is convicted under RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, the standard sentence range for each of these current offenses shall be determined by using all other current and prior convictions, except other current convictions for the felony crimes listed in this subsection (1)(c), as if they were prior convictions. The offender shall serve consecutive sentences for each conviction of the felony crimes listed in this subsection (1)(c), and for each firearm unlawfully possessed.

Based on Drath's offender score and convictions on all charged offenses, she faced a total sentencing range of 103-136 months. CP 7.

Following her convictions, Drath filed a pro se motion for a new trial, arguing, among other issues, that she had received ineffective assistance of counsel in that trial counsel failed to inform her of the consecutive sentencing requirement. CP 111-16. The court allowed trial counsel to withdraw and appointed substitute counsel to represent Drath. RP 1378. Her new attorney filed a motion for new trial on the grounds that trial counsel was ineffective, and the court held an evidentiary hearing on the motion. CP 100-03; RP 1387, 1408.

At the hearing the court heard testimony from the five attorneys who had represented Drath over the course of this case, including her trial counsel F. McNamara Jardine. None of the previous counsel recalled discussing with Drath the number of months confinement she would face if convicted of the charges on which she went to trial. Her first attorney, Ronald Sergi, could not recall whether he got to the point of discussing potential sentences before he withdrew due to a conflict. RP 1440. Sean Tashcner, Drath's next attorney, said he had mentioned consecutive sentences to Drath but never specifically discussed the top and bottom of the sentence range. RP 1453-54. Peter Jones testified that he discussed the operation of the statutory requirement of consecutive sentences with

Drath, but he did not recall telling her the specific sentencing range she would face if convicted as charged. RP 1468, 1475.

James Gazori represented Drath through the first trial which resulted in mistrial. RP 1487. He testified that he spoke to Drath about the sentencing range in years rather than months, and he discussed the effect of consecutive sentencing although he did not use the word “consecutive.” RP 1491, 1505. On the day the mistrial was declared Gazori conveyed a plea offer to Drath for the same length of sentence Herigstad received. RP 1502. Drath never said she would not take the offer, but she wanted to discuss it with her family, and it was withdrawn before she responded. RP 1506.

Jardine testified that at her first meeting with Drath she provided Drath a worksheet listing the charges and sentence ranges. The worksheet failed to reflect that some of the sentences would be served consecutively, however. Thus, the bottom line total sentence range on that worksheet was 87-116 months, reflecting the sentence range for first degree burglary. RP 1527-28. Jardine had no memory of telling Drath the actual sentence would be greater than 87-116 months or discussing a range of 103-136 months with Drath. RP 1529-30.

Jardine discussed a plea offer of 67-75 months with Drath, which Drath did not accept. RP 1520. As the case got closer to trial, Jardine

presented the State with an offer of 40 months to resolve the case, and the prosecutor countered with an offer of 50 months. RP 1521-22. Drath rejected that offer, and the case went to trial. RP 1523.

Drath testified at the hearing that she had discussions about sentencing consequences with some of her attorneys. RP 1541. She knew Gazori had talked to her about sentencing, but she did not recall him giving her exact numbers if she were convicted as charged. RP 1542. Drath said she had been willing to accept the 36 month plea offer made on the day of the mistrial, but she wanted to talk to her family first. When she told him the next day that she would take the offer, she learned that the offer was no longer on the table. RP 1543-44.

Jardine then took over the case, and in their first meeting Jardine gave Drath the worksheet with sentence ranges, showing a maximum range of 87-116 months. RP 1544-47. Jardine never informed Drath that if she were convicted, some of those sentences by law would run consecutively. RP 1546. She was never told by any of her attorneys that she would face a sentencing range of 103-136 months if convicted as charged. RP 1548.

After Jardine initiated negotiations with the State, she communicated the offer of 50 months to Drath. Drath testified that after consultation with Jardine she rejected the offer. RP 1547. She said that if

she had known that her sentencing range would be 103-136 months, she would have considered the plea offer of 50 months. RP 1548. When asked if she would have accepted the offer, she responded, “I’m not sure if I can answer that.” RP 1548. But at the time the offer was communicated to her and trial commenced she understood her sentencing range would be 87-116 months if convicted of all charges, based on the information Jardine provided in the worksheet. RP 1548-49.

The court found that Jardine did not take into account the requirement for consecutive sentences in RCW 9.94A.589(1)(c) when she advised Drath regarding sentencing consequences, and thus there was a significant error in the advice she gave Drath. RP 1590. Jardine’s calculation of the potential sentence Drath faced if convicted at trial of all pending counts was incorrect. The actual potential sentence was significantly larger. RP 1591. Jardine never corrected this error through the end of trial. RP 1592. Both the plea offers of 67-75 months and 50 months were considered and rejected by Drath in the context of the erroneous sentencing calculation by Jardine. RP 1593; CP 7-8.

The court concluded that Jardine’s performance fell below an objective standard of reasonableness and was therefore deficient. RP 1595; CP 9. It further concluded, though, that Drath did not establish by a reasonable probability that but for counsel’s deficient performance the

result would have been different, because Drath was unable to say that she would have accepted the plea offer if she had known the correct sentencing range she faced if convicted. RP 1596; CP 10. The court denied the motion for a new trial. *Id.*

a. Drath was denied her right to effective assistance of counsel in the plea negotiation process.

Drath was misinformed regarding the consequences of proceeding to trial rather than accepting the plea offer. This unprofessional error by counsel affected the outcome of the proceedings and constitutes ineffective assistance of counsel. This Court reviews ineffective assistance of counsel claims de novo. *State v. Jones*, 183 Wn.2d 327, 338-39, 352 P.3d 776 (2015).

Every criminal defendant is guaranteed the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); U.S. Const. amend. VI; Wash. Const. art. I, § 22. This right extends to the plea-bargaining process. *Lafler v. Cooper*, 566 U.S. 156, 162, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012); *State v. Estes*, ___ Wn.2d ___, 395 P.3d 1045, 1049, 1052 (2017); *State v. A.N.J.*, 168 Wn.2d 91, 111, 225 P.3d 956 (2010). A defendant is denied effective assistance when his attorney's conduct "(1) falls below a minimum

objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." *State v. Benn*, 120 Wn.2d 631, 663, 845 P.2d 289 (citing *Strickland*, 466 U.S. at 687-88), *cert. denied*, 510 U.S. 944 (1993).

To establish the first prong of the Strickland test, the defendant must show that "counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." *Thomas*, 109 Wn.2d at 229-30. To establish the second prong, the defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case" in order to prove that he received ineffective assistance of counsel. *Thomas*, 109 Wn.2d at 226. Rather, only a reasonable probability of such prejudice is required. *Strickland*, 466 U.S. at 693; *Jones*, 183 Wn.2d at 339. A reasonable probability is one sufficient to undermine confidence in the outcome of the case. *Strickland*, 466 U.S. at 694.

b. Counsel's performance was deficient.

Trial counsel has duty to research relevant statutes and be aware of their consequences when advising the defendant. Failure to do so amounts to deficient performance. *Estes*, 395 P.3d at 1050. In *Estes*, the defendant was convicted of felony harassment and third degree assault, with deadly weapon verdicts on both counts. His defense attorney failed to realize

until after trial that the deadly weapon enhancements would elevate the convictions to strike offenses. As a result, counsel did not properly advise Estes of his options during plea negotiations and did not challenge the deadly weapon evidence or instructions at trial. Estes had two prior strike convictions, and he was sentenced to mandatory life in prison as a persistent offender. He appealed, alleging ineffective assistance of counsel. *Estes*, 395 P.3d at 1047. The Supreme Court concluded that defense counsel's failure to investigate the impact of deadly weapons enhancements, thereby failing to understand that the enhancements would elevate the non-strike charges to strikes, was objectively unreasonable. *Estes*, 395 P.3d at 1050-51. Counsel's error constituted deficient performance. *Id.* at 1051.

Similarly, here, Jardine failed to take into account the effect of RCW 9.94A.589(1)(c), which mandates consecutive sentences for unlawful possession of a firearm and theft of a firearm convictions, when advising Drath of the potential sentencing consequences if she proceeded to trial. Jardine misinformed Drath that the total sentence range she faced if convicted as charged was 87-116 months, when in fact the range was 103-136 months. It was in this context that Drath rejected the plea offers presented to her. Counsel's performance fell below an objective standard of reasonableness in failing to investigate the impact of this statutory

provision and misinforming Drath of potential sentencing consequences. Her error constitutes deficient performance.

c. Counsel's deficient performance prejudiced the defense.

The second prong of the *Strickland* test requires this Court to determine whether counsel's unprofessional error prejudiced Drath. In the context of plea negotiations, the defendant must show the outcome of the plea process would have been different with competent advice. *Lafler*, 566 U.S. at 163; *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) ("The ... 'prejudice,' requirement ... focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process").

In *Lafler*, the defendant went to trial rather than accept a plea deal, based on ineffective assistance during the plea negotiation process. As a result he received a more severe sentence after trial than he would have received by pleading guilty. The Court recognized that the fact that the defendant received a fair trial did not cure the error from this ineffective assistance of counsel. "Even if the trial itself is free from constitutional flaw, the defendant who goes to trial instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence." *Lafler*, 566 U.S. at 166.

If a plea bargain has been offered, the defendant has a right to effective assistance of counsel in considering whether to accept that offer. If that right is denied, prejudice is shown if the lost plea opportunity led to a trial resulting in imposition of a more severe sentence. *Lafler*, 566 U.S. at 168. Such is the case here. Because of Jardine's erroneous advice, Drath lost the opportunity to make an informed decision on the State's plea offer, which led her to proceed to trial and resulted in the imposition of a more severe sentence.

The record shows that Drath was open to plea negotiations. She had previously decided to accept an offer of 36 months, but it was withdrawn when the first trial ended in mistrial. She then authorized Jardine to negotiate with the prosecutor, and the prosecutor responded with an offer of 50 months. Drath ultimately rejected the offer after being misinformed by trial counsel about the sentencing consequences if she was convicted after trial. Although Drath was unable to say for certain that she would have accepted the offer if she had been fully and accurately informed, Drath made it clear that she would have considered the offer. This is sufficient to establish a reasonable probability that counsel's error affected the outcome of the plea negotiations. *See Estes*, 395 P.3d at 1053.

In *Estes*, there was no evidence in the record of any specific plea offer or testimony from Estes that he would have accepted a plea deal. The record showed only that the State had been willing to work with Estes to avoid a third strike conviction, but Estes, lacking knowledge about a key matter, had refused to negotiate. *Estes*, 395 P.3d at 1053. The court acknowledged that the record did not show with complete certainty that, had Estes known about the impact of the deadly weapon enhancements, he would have been able to negotiate a different outcome. Such certainty is not required to find prejudice, however. Under *Strickland*, the defendant need not even show that a different outcome is more likely than not. *Estes*, 395 P.3d at 1053 (citing *Strickland*, 466 U.S. at 693). The court concluded that it was reasonably probable that had Estes known there was a much higher chance he would be sentenced to life in prison, the result of the proceedings would have been different. *Estes*, 395 P.3d at 1053.

The same is true here. Prejudice was established in that counsel failed to communicate crucial information to Drath regarding sentencing consequences if she proceeded to trial, denying her the ability to make an informed decision about whether to plead guilty. There is a reasonable probability that had Drath known about the effect of the consecutive sentence provision and the actual sentence range she faced, the result of the proceedings would have been different.

d. This Court must tailor a remedy to the injury Drath suffered.

Sixth Amendment remedies should be “tailored to the injury suffered” and must “neutralize the taint’ of a constitutional violation” while not granting a windfall to the defendant. *Lafler*, 566 U.S. at 170 (quoting *United States v. Morrison*, 449 U.S. 361, 364-65, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981)). In *Lafler*, the Court noted that the specific injury resulting from declining a plea offer as a result of ineffective assistance of counsel will depend on the circumstances. Where the lost plea offer was for a guilty plea to less serious charges, resentencing based on the convictions at trial will not remedy the constitutional violation. Instead, the prosecutor may need to reoffer the plea deal. *Lafler*, 566 U.S. at 171. The Court did not attempt to define the boundaries of discretion in fashioning the appropriate remedy, leaving it to future decisions, statutes, and rules to give more complete guidance. *Id.*

In *Lafler*, where the defendant showed that but for counsel’s deficient performance there was a reasonable probability he would have accepted the guilty plea to lesser charges, the Court ordered the State to reoffer the plea agreement. If accepted the state court would decide whether to vacate the convictions and resentence under the plea agreement. *Lafler*, 566 U.S. at 174-75.

The Washington Supreme Court determined that a new trial was necessary to remedy the ineffective assistance of counsel in *Estes*. There, the record showed that defense counsel did not know the significance of the deadly weapon enhancements and thus could not have communicated that information to Estes. Lacking this information, Estes refused to negotiate from the outset, and thus no specific plea offer had been declined. Because Estes was not able to make an informed decision about whether to plead guilty, the court remanded for a new trial. *Estes*, 395 P.3d at 1054.

Here, the record shows Drath was open to negotiating a plea agreement, but she rejected two offers from the State after Jardine misinformed her of the potential sentencing consequences should she be convicted as charged. Counsel's error denied Drath the ability to make an informed decision whether to plead guilty to reduced charges with a sentence recommendation of 50 months. The appropriate remedy to neutralize the taint of ineffective assistance of counsel in this case is to vacate the convictions and allow Drath to make an informed decision whether to accept the 50-month plea offer or proceed to trial. *See Estes*, 395 P.3d at 1054.

2. THE TRIAL COURT VIOLATED DRATH'S
CONSTITUTIONAL RIGHTS TO CONFRONTATION
AND TO PRESENT A DEFENSE BY EXCLUDING
EVIDENCE OF HERIGSTAD'S BIAS.

While cross examining Herigstad, the defense sought to admit evidence about several letters he had written to Drath when he was in jail prior to his guilty plea. The defense theory was that Herigstad was initially loving and supportive of Drath, but there was a turning point when Drath rejected him, after which he made statements implicating her. The contents of the letters were offered to demonstrate that shift. RP 613-14.

In a letter written on June 7, 2011, Herigstad proposed marriage to Drath. CP 613; Exhibit 175. In his next letter Herigstad referred to the fact that he had reviewed the discovery and found that Drath had made statements that could hurt his case. He told her not to worry about it, saying he knew she was scared, and he would love her no matter what. RP 614-15; Exhibit 176. In a letter dated June 20, 2011, Herigstad told Drath that if the prosecution offered him a good enough deal he would plead guilty if they dropped the charges against her. RP 615; Exhibit 177. The court permitted cross examination regarding these three letters. RP 629-33.

In a fourth letter, Herigstad's tone had changed. He told Drath he did not know how she could have given up on their relationship so easily. He said that he had not given any statements and he was not trashing her. He said, "I heard you already found someone new, wow, that was quick." RP 615-16; Exhibit 178. Defense counsel argued it was significant that Herigstad was no longer offering to accept responsibility so that the charges against Drath could be dropped. The letter showed his anger toward Drath was escalating. RP 622-23. Counsel argued this letter was relevant to the defense theory that Drath was not part of the burglary. Herigstad and Cavanaugh concocted the story after they started toppling and learning of the consequences they faced. When things did not go Herigstad's way romantically, he started bringing Drath in as retaliation. RP 623-24. Exhibit 178 showed the turning point. He had become agitated with Drath, who had not responded to his marriage proposal, and who he heard was seeing someone new. It was shortly after this letter that he first made statements implicating Drath. RP 625-26. The court ruled that the letter was not relevant and excluded testimony about it. RP 627.

On cross examination Herigstad described the contents of the three letters the court ruled admissible. RP 629-33. He also testified that Drath stopped writing to him at some point, and he did not recall if she

responded to his marriage proposal. He said she fell out of his favor at some point, but he did not remember why. RP 634-35.

Due process requires that criminal defendants receive a meaningful opportunity to present a complete defense. *State v. Wittenbarger*, 124 Wn.2d 467, 474, 880 P.2d 517 (1994). Absent a valid justification, excluding relevant defense evidence “deprives a defendant of the basic right to have the prosecutor’s case encounter and survive the crucible of meaningful adversarial testing.” *Crane v. Kentucky*, 476 U.S. 683, 689-90, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986).

In addition, the Sixth Amendment and Const. art. 1, § 22, guarantee a criminal defendant the right to confront and cross-examine adverse witnesses. *Davis v. Alaska*, 415 U.S. 308, 316, 39 L. Ed. 2d 347, 94 S. Ct. 1105, 1110 (1974); *State v. Russell*, 125 Wn.2d 24, 73, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). Confrontation is a fundamental “bedrock” protection in a criminal case. *Crawford v. Washington*, 541 U.S. 36, 42, 124 S. Ct. 1354, 1359, 158 L. Ed. 2d 177 (2004). The primary and most important component of the constitutional right of confrontation is the right to conduct a meaningful cross examination. *Davis*, 415 U.S. at 316; *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002).

The purpose of cross examination is to test the perception, memory, and credibility of witnesses, thus assuring the accuracy of the fact finding process. *Davis*, 415 U.S. 316; *Darden*, 145 Wn.2d at 620. “Whenever the right to confront is denied, the ultimate integrity of this fact-finding process is called into question.... As such, the right to confront must be zealously guarded.” *Darden*, 145 Wn.2d at 620 (citations omitted). While the trial court’s limitation on the scope of cross examination is reviewed for abuse of discretion, the more essential the witness is to the prosecution’s case, the more latitude the defense should be given to explore motive, bias, and credibility. *Darden*, 145 Wn.2d at 619.

The right of confrontation and the associated right of cross-examination are limited by general considerations of relevance. See ER 401²; ER 403³; *Darden*, 145 Wn.2d at 621. The threshold for relevancy is very low. Even minimally relevant evidence is admissible. *Darden*, 145 Wn.2d at 621 (citing *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983)).

² “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

³ “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

Here, the trial court limited cross examination of Herigstad regarding letters he had written to Drath while he was in jail. It allowed defense counsel to question Herigstad about the letters in which he proposed marriage, told Drath he would love her no matter what, and said he would plead guilty if the State dropped the charges against Drath. But it excluded cross examination about the letter in which he commented that Drath had found someone new and the fact that Herigstad started making statements implicating Drath shortly after that letter. The court said it did not see the relevance of that evidence.

A “proper and important function” of the right to present a defense includes the right to attack a witness’s credibility by “revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand.” *Davis*, 415 U.S. at 316-17. A defendant’s right to confrontation includes the right to impeach a prosecution witness with evidence of bias. *Davis*, 415 U.S. at 316-18; *State v. Spencer*, 111 Wn. App. 401, 408, 45 P.3d 209 (2002), *review denied*, 148 Wn.2d 1009 (2003); *State v. Johnson*, 90 Wn. App. 54, 69, 950 P.2d 981 (1998). The bias of a witness is always relevant to discredit that witness’s testimony. *Davis*, 415 U.S. at 316.

Bias refers to “the relationship between a party and witness which might lead the witness to slant, unconsciously or otherwise, his testimony

in favor of or against a party.” *United States v. Abel*, 469 U.S. 45, 52, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984). “Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness’ testimony.” *Id.*

The evidence excluded here, which showed Herigstad believed Drath had jilted him and he thereafter starting implicating Drath, was relevant to establish his bias against Drath. Although defense counsel did not use the term bias, it was clear from her argument that that was the purpose of the offered evidence. In her offer of proof counsel stated that there was clearly a turning point where Herigstad was no longer cordial and supportive of Drath, and that was when he was rejected by her. Up to that point he had made no statements implicating Drath. But once she stopped responding to his letters and he found out she had a new man in her life, he started cooperating with Detective Rhoades. RP 613-14. Counsel argued that the excluded letter had a different tone than the previous letters, showing escalating anger toward Drath. RP 615. Counsel further argued that this evidence was relevant to the defense theory, which was that Herigstad implicated Drath in retaliation when things did not go his way romantically. RP 623-24.

The excluded letter was crucial evidence regarding the changing relationship between Herigstad and Drath which might lead him to slant his testimony against her. It was thus relevant to the jury's credibility determination. The jury was entitled to have that evidence before them so they could make an informed decision as to the weight to put on Herigstad's testimony. *See Davis*, 415 U.S. at 317-18.

Great latitude must be allowed in cross-examining a key prosecution witness, particularly an accomplice who has turned State's witness, to show motive for his testimony. The right of cross-examination allows more than the asking of general questions concerning bias; it guarantees an opportunity to show specific reasons why a witness might be biased in a particular case."

State v. Brooks, 25 Wn.App. 550, 551-52, 611 P.2d 1274, *review denied*, 93 Wn.2d 1030 (1980) (citations omitted). The more essential the witness to the prosecution's case, the more latitude the defense should be given to explore bias and credibility. *Darden*, 145 Wn.2d at 619.

Herigstad was presented as an accomplice to the charged offenses, and his testimony was essential to the State's case. There was no physical evidence placing Drath at Maffei's house. RP 358-59, 361. The State relied primarily on Herigstad's testimony that Drath participated in the burglary. Thus, evidence which tended to show his bias against Drath was highly relevant, and Drath should have been given latitude to explore this area on cross examination. The trial court violated Drath's right of

confrontation and right to present a defense by excluding evidence of Herigstad's bias.

These constitutional violations are presumed prejudicial and require reversal unless the State proves the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt beyond a reasonable doubt. *State v. Watt*, 160 Wn.2d 626, 635-41, 160 P.3d 640 (2007). The State cannot meet that burden here. As mentioned above, there was no physical evidence placing Drath in Maffei's house. Cavanaugh testified that Drath entered the house after he broke into the second gun safe, but he had given numerous conflicting statements before settling on a story which earned him a favorable plea deal, and the jury could easily have discounted his testimony as unreliable. Herigstad is the only witness who identified Drath as a participant from the beginning. If the jury had been permitted to consider the improperly excluded evidence of Herigstad's bias, it could have questioned his credibility enough to find reasonable doubt as to Drath's guilt. The constitutional error was not harmless, and Drath's convictions must be reversed.

3. DEFENSE COUNSEL’S FAILURE TO OBJECT TO AND SEEK A CURATIVE INSTRUCTION FOR PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT DENIED DRATH EFFECTIVE REPRESENTATION.

The state and federal constitutions guarantee criminal defendants the right to effective assistance of counsel. U.S. Const. amend. VI; Wash. Const. art. I, § 22 (amend.10). This constitutionally guaranteed right to counsel is not merely a simple right to have counsel appointed; it is a substantive right to meaningful representation. *See Evitts v. Lucey*, 469 U.S. 387, 395, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985) (“Because the right to counsel is so fundamental to a fair trial, the Constitution cannot tolerate trials in which counsel, though present in name, is unable to assist the defendant to obtain a fair decision on the merits.”); *Strickland*, 466 U.S. at 685 (“The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.”) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 87 L.Ed. 268, 143 A.L.R. 435 (1942)).

A defendant is denied his right to effective representation when his attorney’s conduct “(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome

would be different but for the attorney's conduct." *Benn*, 120 Wn.2d at 663 (citing *Strickland*, 466 U.S. at 687-88). In this case, trial counsel's failure to object to and request a curative instruction for the prosecutor's misconduct in closing argument amounts to ineffective assistance of counsel.

The prosecutor misstated the law and misled the jury as to the State's burden during closing argument, telling the jury that the elements of the offenses were "not all in controversy." RP 1302. He argued that the only controversy was the role Drath played in the charged crimes, "Because there's absolutely no issue that there was a burglary at Mr. Maffei's residence over the month of March and early April of 2011. Absolutely, no." RP 1302. He argued that because Maffei testified as to the dates he was away from the house the time period was not in controversy, and because Maffei testified about the items missing from his house, that was not in controversy. He argued that the fact that stolen property was trafficked was not in controversy because multiple witnesses testified to that. RP 1302-033. He argued that as to all the elements instructions, the key question for the jury to analyze was whether Drath did each of these. RP 1303.

Due process requires the State to bear the burden of proving every element of the charged offenses beyond a reasonable doubt. *In re*

Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Cantu*, 156 Wn.2d 819, 825, 132 P.3d 725 (2006). It is error for the prosecutor to suggest otherwise. *State v. Warren*, 165 Wn.2d 17, 27, 195 P.3d 940 (2008). “Arguments by the prosecution that shift or misstate the State’s burden to prove the defendant’s guilt beyond a reasonable doubt constitute misconduct.” *State v. Lindsay*, 180 Wn.2d 423, 434, 326 P.3d 125 (2014) (argument quantifying reasonable doubt standard and comparing standard to everyday decision making improper). An argument which trivializes the State’s burden and the jury’s role in assessing the State’s case undermines the defendant’s due process rights and is improper. *Id.* at 435-36; *State v. Johnson*, 158 Wn. App. 677, 685-86, 243 P.3d 936 (2010); *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009) (argument comparing reasonable doubt standard to everyday decision making), *review denied*, 170 Wn.2d 1002 (2010).

The prosecutor’s argument trivialized the State’s burden and misstated the jury’s role in assessing the State’s case. With the exception of the “previous conviction” elements in the unlawful possession of a firearm charges to which Drath stipulated, every element of every charged offense was “in controversy” and required the State to prove it beyond a reasonable doubt. Telling the jury that elements were not in controversy simply because the State had presented evidence on those elements

misstated the State's burden and the jury's role. The prosecutor suggested that if the State's evidence on an element was uncontested, the jury did not have to decide that element. Even if there was no contradictory evidence, however, the jury did not have to believe the State's witnesses and could find the State had not proven its case. Telling the jury that numerous elements were not in controversy because the State had presented evidence as to those elements trivialized the State's burden of proof and misrepresented the jury's role in assessing the case against Drath.

Defense counsel's failure to object to the prosecutor's misconduct denied Drath effective assistance of counsel. Had counsel objected, the error could have been cured with an instruction from the court reaffirming the State's burden of proof. *See Warren*, 165 Wn.2d at 28. In *Warren*, the prosecutor misstated the burden of proof during closing argument. After three objections by the defense, the court gave a *sua sponte* curative instruction. This instruction was sufficient to remove the prejudice from the prosecutor's improper argument. *Warren*, 165 Wn.2d at 23-24, 28.

Moreover, there was no legitimate strategic reason for failing to object in this case. Counsel clearly recognized the need to correct the prosecutor's misleading argument. Instead of seeking a curative instruction from the court, she sought to cure the error herself, arguing that it was the jury's duty to decide the facts, and every element of every

charge against Drath was called into question. RP 1336. This was not sufficient. “The jury knows that the prosecutor is an officer of the State.” *Warren*, 165 Wn.2d at 27. Thus, a misstatement of the law by the prosecutor is “a serious irregularity having the grave potential to mislead the jury.” *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984). Counsel must object to the prosecutor’s improper argument when made to give the court an opportunity to correct and caution the jury against being influenced by the improper remarks. *State v. Emery*, 174 Wn.2d 741, 761-62, 278 P.3d 653 (2012) (citing 13 Washington Practice: Criminal Practice And Procedure § 4505, at 295 (3d ed. 2004)).

Counsel’s failure to object to the prosecutor’s misconduct fell below an objective standard of reasonableness, and there is a reasonable probability counsel’s deficient performance prejudiced the defense. The defense relied on holding the State to its burden of proof. *See* RP 1335-36. The prosecutor’s argument trivializing that burden and misrepresenting the jury’s role in assessing the State’s case, presented by a quasi-judicial officer and going uncorrected by the court, undermines confidence in the outcome of the case. Drath received ineffective assistance of counsel, and her convictions must be reversed and the case remanded for a new trial.

D. CONCLUSION

Drath received ineffective assistance of counsel during the plea negotiation process, and her convictions must be vacated, the case remanded, and the plea offer reinstated. In addition, the improper exclusion of bias evidence violated Drath's rights to present a defense and of confrontation, and counsel's failure to object to and request a curative instruction for the prosecutor's misconduct in closing argument constituted ineffective assistance of counsel. Drath's convictions must be reversed and the case remanded for a new trial.

DATED July 12, 2017.

Respectfully submitted,



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Today I caused to be mailed copies of the Brief of Appellant and
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Catherine E. Glinski
Done in Manchester, WA
July 12, 2017

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